No. 74-6438

In the Supreme Court of the United States

OCTOBER TERM, 1975

EWELL SCOTT, PETITIONER

v.

KENTUCKY PAROLE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether a prisoner's application for parole implicates the procedural protections of the Due Process Clause.[1]

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[1] We do not discuss whether petitioner should be allowed to substitute new parties in this Court. Cf. *Rogers* v. *Paul*, 382 U.S. 198, 199. If substitution is not allowed, however, this case is apparently moot, for petitioner was released on parole on November 26, 1975. See *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10, 1975; *Preiser* v. *Newkirk*, 422 U.S. 395.

INTEREST OF THE UNITED STATES

This case involves the question whether a prisoner's application for parole, during a period of eligibility, implicates the procedural protections of the Due Process Clause. For the reasons that we discuss below, we believe that a prisoner's unilateral expectation that the Board will exercise its discretion in his favor is neither a "liberty" nor a "property" interest within the meaning of that Clause, and consequently that the responsibility for evaluating and implementing the procedures to be followed in considering applications for parole is entrusted to the provinces of the federal and state legislatures and executives. A contrary decision by this Court would affect the constitutional context in which the federal parole system operates.

1. The United States maintains an extensive parole system. In 1975 the United States Board of Parole made 10,998 final parole decisions concerning adult prisoners, and granted parole in 5,316, or slightly less than half, of the cases.[2]

Under the Board's regulations (28 C.F.R. Part 2 (1975), as amended, 40 Fed. Reg. 41328-41342; see Pet. Br. App. C), a prisoner's application for parole is accorded substantial procedural protection. Application forms are provided to each prisoner eligible for parole. Each prisoner also receives an Inmate Background Statement, which he can return to the Board

[2] This information has been derived by the Board of Parole from unpublished data.

to present his version of the factors the Board should consider. Although the regulations do not require a hearing on every application, we are informed by the Board that hearings are granted as a matter of course. The prisoner is given written notice of the time and place of the hearing. Before the hearing, he is entitled to review his central file, including classification and disciplinary reports. He is entitled to be represented at the hearing by a person of his choice.

The initial parole hearing is conducted by a panel of two examiners designated by the Board. The panel discusses with the inmate the factors it considers in acting on his application, including the facts relating to his offense, his prior criminal record, his personal history and institutional experience, changes in his motivation and behavior, and his release plans. The Board has prescribed objective guidelines indicating the customary range of time to be served before release for various combinations of these factors. The inmate's representative may respond to the panel's questions during the hearing and may offer a statement at the conclusion.

If parole is denied, the prisoner is furnished in most cases with a "guideline evaluation statement," which sets forth the factors upon which the Board relied and shows the Board's evaluation of those factors in the prisoner's case.

The prisoner may appeal an adverse panel decision

to the Regional Director. The prisoner may not appear at the appellate hearing, but attorneys, relatives, and other interested parties may appear at the discretion of the Director. The Regional Director's decision can be appealed to the National Appellate Board. The National Appellate Board's decision is final.

2. These parole procedures are unlikely to be directly affected by the outcome of this case. The interest of the United States in this case is more general: to defend the prerogatives of Congress and the Executive to reconsider, determine, and implement the procedures that govern consideration of applications for parole.

Current statutes delegate absolute discretion to the Board of Parole to decide whether a prisoner shall be paroled. See 18 U.S.C. 4202 and 4203. The Board's present hearing and release guidelines and procedures were developed by the Board after a careful three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Board's regions. If this Court should hold that the Due Process Clause governs consideration of applications for parole, future experimentation and alteration could be hindered or precluded. Moreover, the United States is considering making substantial changes in the parole system. H.R. 5727, 94th Cong., 2d Sess., was passed by the Senate on March 2, 1976, by the House on March 3, 1976, and has

been transmitted to the President, who has not yet (as of March 10, 1976) acted upon the bill.[3] The

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[3] H.R. 5727 would abolish the Board of Parole and create a "United States Parole Commission" as an independent agency within the Department of Justice. The bill provides that any prisoner would be eligible for parole after one-third (or ten years, whichever comes first) of his sentence. The bill would amend 18 U.S.C. 4206 to provide that "[i]f an eligible prisoner has substantially observed the rules of the institution * * * to which he has been confined, and if the Commission * * * determines" that his release would not depreciate the seriousness of his offense or promote disrespect for the law, and that "release would not jeopardize the public welfare," the prisoner "shall be released." This provision would be qualified by Section 4206(c), which would allow the Commission to "grant or deny release on parole notwithstanding the guidelines referred to * * * [above] if it determines there is good cause for so doing." In order to exercise this discretion the Commission must give the prisoner a written notice of the reasons for the decision and must provide the prisoner "a summary of the information relied upon." After serving two-thirds of his sentence (or 30 years, whichever comes first) a prisoner "shall" be released without respect to the criteria already described, except that "the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules or regulations or that there is a reasonable probability that he will commit any * * * crime." Under the argument we present at pages 17-29, *infra*, H.R. 5727 therefore would establish a constitutionally protected interest in release from prison after an inmate has served two-thirds (or 30 years) of his sentence; he could not be retained longer in prison without procedures designed to facilitate accurate determination of the facts upon which release could be withheld. Prior to that time, however, the Commission would possess complete discretion over the grant or denial of parole, subject only to the "guidelines" enumerated and to its obligation (under proposed Section 4206(c)) to give notice and provide a factual summary.

H.R. 5727 itself establishes procedures more comprehensive

Attorney General has suggested that serious consideration should be given to abolishing parole and replacing it with a system of mandatory release after a period of good behavior.[4] The power of Congress to choose among proposed release systems could be substantially affected by the outcome of this case.

Many other types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal authorities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to placement in a particular prison, security classification, and work assignments are but a few of many exam-

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than would be required by the Due Process Clause. The bill provides that each inmate shall be afforded a personal hearing at least every two years on and after the date of his eligibility for release. He is entitled to appear in person and to testify; he may be accompanied by a representative; the Commission must give him notice of the hearing and make available to him any file or report to be used in making its decision. A record of the hearing would be kept and, if parole is denied, the prisoner would be entitled to a personal conference with the responsible examiner or Commissioner at which the reasons for denial would be explained.

[4] Address by the Attorney General before the Governors' Conference on Employment and the Prevention of Crime, February 2, 1976. Maine has adopted a program similar to that proposed by the Attorney General. See Maine Revised Statutes Annotated, Title 17-A, § 1254 (effective March 1, 1976). Other States are considering legislation to the same effect.

ples.[5] The Court's resolution of the question presented here could have significant implications for the institutional handling of such "housekeeping" decisions.

STATEMENT

Kentucky allows most prison inmates to apply for parole upon completion of a specified portion of their sentences. State law commits the decision whether to grant parole to the discretion of the Kentucky Parole Board. Kentucky Rev. Stat. §§ 439.320, 439.330 and 439.340 (1973). The Parole Board has not bound itself by express or implied rules to grant parole in any particular case. It retains discretion over all applications, and no specific set of facts will entitle an individual to be paroled. See Pet. Br. 9-10, 5a-6a; *Harrison* v. *Robuck*, 508 S.W.2d 767 (Ky.).

Petitioner is an inmate in the Kentucky state prison system who was considered for and denied immediate parole. On February 15, 1974, petitioner and Calvin Bell, who also had been denied parole, brought a class action under 42 U.S.C. 1983, asserting that the State had not used constitutionally adequate procedures in considering their parole applications (App. 2-9). The

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[5] See, *e.g.*, *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055 (institutional placement); *Meachum* v. *Fano*, No. 75-252, certiorari granted, December 8, 1975 (same); *Cardaropoli* v. *Norton*, 523 F.2d 990 (C.A. 2) (institutional status designation); *Lokey* v. *Richardson*, C.A. 9, No. 74-1256, decided December 9, 1975 (security classification); *Carlo* v. *Gunter*, 520 F.2d 1293 (C.A. 1) (same); *United States ex rel. Myers* v. *Sielaff*, 381 F. Supp. 840 (E.D. Pa.) (application for discretionary furlough).

complaint stated that, although petitioner had an opportunity to meet with the Parole Board after advance notice (App. 4-5), he was not allowed to present evidence, to be represented by counsel, or to see or rebut any evidence upon which the Parole Board may have relied (App. 5). The complaint also stated that the Parole Board rarely announces reasons for its decisions to grant or deny applications for parole (App. 5-6) and that it has not announced any standards or rules governing the exercise of its discretion to pass upon applications (App. 3, 5, 7).

The district court refused to certify the case as a class action and denied the individual claims for declaratory and injunctive relief (App. 14-16).[6] The

[6] There is a substantial question whether this case is properly before the Court. Petitioner's civil rights action sought an injunction that would have directed respondents to promulgate rules for the conduct of parole release hearings meeting at least nine criteria that the complaint asserted are established by the Constitution (App. 8-9). Constitutional challenges seeking injunctions against state statutes and regulations of statewide applicability must be heard by district courts of three judges. 28 U.S.C. 2281. Many of the prison due process cases that have been considered by this Court have been heard on appeal from a three-judge district court. See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396. (Other cases arose in *habeas corpus*; no injunction was sought.)

Many of petitioner's constitutional arguments expressly challenge the validity of state statutes and of the regulations (Pet. Br. 1a-8a) promulgated by the Kentucky Parole Board. In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison conditions, the Fifth Circuit has unanimously held *en banc* that in situations of this sort a three-judge court must be convened. *Sands* v. *Wainwright*, 491 F.2d 417, certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992. Even if the statewide practices under attack are simply authorized or permitted by state statutes or regulations rather than compelled by them, a three-judge court still would appear to be required. See *Sands* v. *Wainwright*, *supra*, 491 F.2d at 427-429; *Gilmore* v. *Lynch*, 400 F.2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092; *McCarty* v. *Woodson*, 465 F.2d 822 (C.A. 10). Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 50 (1964).

district court held that the Due Process Clause does not apply to the consideration of applications for parole. The court of appeals affirmed, concluding that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution * * *" (App. 21).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's presentation reflects the understanding that parole release decisions are of great importance in the life of a prisoner, and the belief that it is concomitantly important that such decisions be made only after studied deliberations and procedures calculated to minimize the chance that a denial of parole will be based upon misapprehensions of fact or mistaken judgment. There is much to be said for that view, and the federal Board of Parole now provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular case.

The result for which petitioner argues therefore may accord with "enlightened public policy." But the question here is not the wisdom of the result but rather whether the task of defining and implementing "enlightened public policy" with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings or other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decisionmaking functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when a constitutionally protected interest in liberty or property is at stake.

Legislatures and administrators, as well as courts, strive to be sensitive to the needs and desires of prison inmates. Congress has transmitted to the President a bill that would make major changes in the federal parole system (see note 3, *supra*) and, over a lengthy period of investigation and experimentation, the federal Board of Parole has devised procedures, including a personal hearing, that it believes strike a fair balance between the legitimate interests of the inmates and the needs and objectives of the institution. Kentucky also affords a personal hearing, but other of its procedures differ from those used by federal authorities. As we learn more about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve,

still other procedures may come to appear superior to those now in use. We believe that the choice of procedures is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and evaluate their merits and demerits.

We do not know which parole release process is best; indeed, social science research is barely adequate to enable us to frame the question. The needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Board of Parole is now engaged.[7] What is more, perceptions of the role of imprisonment itself, and the objectives it can accomplish, can be expected to change (compare Wilson, *Thinking About Crime* (1975), with Morris, *The Future of Imprisonment* (1974)) and, as these perceptions change, our ideas about the proper role of parole and the proper way to go about deciding when to grant parole may change with them.[8] The Attorney

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[7] Cf. *United States ex rel. Gereau* v. *Henderson*, 526 F.2d 889, 897 (C.A. 5) ("[w]ith all of the complexities of penology, sociology and criminology, much of which is in a state of undulating flux even for those expert in the field, courts and judges are not equipped to decide [where a prisoner should be confined]. Obviously, no due process hearing is called for in selecting the institution of confinement * * *").

[8] As Judge Friendly has pointed out, there is nothing either suspect or improper—except a poor choice of name—about the "inquisitorial" method of investigating cases and making decisions. That method, which Kentucky has adopted, may be better suited to classes of cases involving "mass justice" than is the adversarial model, involving as it does substantial

General has suggested that discretionary parole might be replaced by a program of mandatory early release upon good behavior—a program Maine has recently adopted and that other States are considering. See also Sigler, *Abolish Parole?*, 39 Fed. Prob. 42 (June 1975). Decisions on these and other similar questions are best left to society at large and to the representatives they elect, unless the Constitution requires otherwise. We do not believe it does in this case.

A. Petitioner's claim to more elaborate parole procedures rests upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of petitioner's claim must begin with an inquiry into whether the denial of parole deprives petitioner of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty in the constitutional sense. He was lawfully deprived of his liberty upon conviction, sentence, and incarceration. Certainly a prisoner has an "interest" in securing his release on parole. But a prisoner's generalized interest in freedom from confinement is not, without more, constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" interests in non-prisoner cases

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quantities of person-to-person argumentation. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1289-1291 (1975).

does not, by and large, pertain to persons lawfully confined.

In other words, a prisoner's legally protected interests relating to release derive not from constitutional concepts of liberty but from the statutes, regulations, and rules that govern the terms of his confinement. At least where the question relates only to release and not to conditions of confinement, a prisoner has no constitutionally protected liberty interest apart from his legitimate claims of entitlement under those statutes, regulations, and rules.

This Court's decisions make it clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectation.

C. Under Kentucky law, the decision whether to grant or deny parole is completely discretionary. No set of facts petitioner could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any par-

ticular controvertible facts but instead is discretionary, petitioner could under no circumstances have a legitimate claim of entitlement to release on parole. Accordingly, petitioner has no constitutionally protected liberty or property interest in being released. Petitioner's only "interest" is a hope, desire, or expectation to be released. But the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectation.

ARGUMENT

UNDER THE KENTUCKY EARLY RELEASE SYSTEM, A PRISONER'S APPLICATION FOR PAROLE DOES NOT IMPLICATE THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE

Parole is a statutory creation. The rules under which a prisoner is entitled to be considered for parole are designed by each State and, for federal prisoners, by Congress. A State could design a parole system under which every prisoner became entitled to early release if he could demonstrate particular facts—for example, good behavior while in prison.[9] In our view, the procedural protections of due process would attach to such an entitlement.

But Kentucky and the United States have not created such an entitlement to parole. Instead, they

[9] Such a design is used for the federal good time credit system; every prisoner is entitled to good time credits that can be withdrawn only on account of misbehavior. See 18 U.S.C. 4161 and 4165.

have committed to the essentially unfettered discretion of a group of experts the decision whether an inmate should be returned to society at some date before the expiration of his sentence as reduced by good time.[10] The use of such a discretionary system of parole no doubt causes each prisoner to hope or even to expect (whether or not such an expectation is objectively warranted) that he will be among those granted an early release. But unless the parole authorities are required to release the prisoner upon a finding of particular facts, the prisoner's hope to be released is no more than a unilateral expectation. As we now show, a State need not provide any particular form of procedure before it acts to disappoint such an expectation.

A. The Procedural Protections Of The Due Process Clause Apply Only To Proceedings That May Result In The Deprivation Of An Individual's "Liberty" Or "Property"

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." [11]

[10] But see note 3, *supra*.

[11] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

Accordingly, this Court, in evaluating claims of right to procedural due process, has been scrupulously careful to identify the nature of the underlying substantive interests at stake in order to determine whether those interests were subsumed under either "liberty" or "property."

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that although "grievous loss" may be a necessary prerequisite to the invocation of due process protections, it is not a sufficient one: the substantiality of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in being released on parole is concededly substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*, 416 U.S. 134; *Goss* v. *Lopez*, 419 U.S. 565, 572-576. It is to that inquiry that we now turn.

B. Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Terms Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Being Released On Parole

It may at first blush appear paradoxical to assert that a prisoner has no constitutionally cognizable "liberty" interest in being released from confinement on parole. This is so because the most elementary form of liberty, freedom from the state's physical control of the person, is at stake in the parole decision. But the question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty. The answer, we believe, is that it does not.

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "lib-

erty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interests. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556. What we do contend here is that a prisoner has been lawfully deprived of his generalized constitutional liberty interest in freedom from confinement by his conviction and sentence.

This consideration distinguishes the denial of parole from its revocation. A prisoner's generalized liberty interest in freedom has been extinguished for the lawful term of confinement. Parole, once granted, revives that interest. Thus at a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; an adverse determination ends the parolee's freedom and thus "deprives" him of "liberty" within the meaning of the Due Process Clause. *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778. A prisoner seeking parole has no similar generalized "liberty" interest in the parole board's decision, for he is not at liberty and he does not stand to lose any liberty as a result of that decision. In short, the fact that a prisoner's

freedom is at stake does not, in and of itself, mean that a constitutionally protected liberty interest is at issue.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based

values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to release are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms of his confinement. In other words, except to the extent that those statutes, regulations, and rules create a positive right to release, a prisoner has no interest in obtaining an early release from confinement to which the procedural protections of due process can attach.

Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, as in *Wolff*, they are in fact nothing more than "property" interests in disguise, *i.e.*, entitlements created by nonconstitutional sources of positive law.[12] As the decision in *Wolff* indicates, a prisoner's interests relating to release must be analyzed in "property" terms; the question in each case must be whether the State has extended to the prisoner a claim of entitlement that warrants procedural protection against unlawful divestment.

[12] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer*, *supra*, a case that purportedly turned upon the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation, was in fact a statutorily created "property" interest, *i.e.*, the entitlement to remain at large unless and until it was demonstrated that he had violated the terms of his parole.

In short, our position here is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must rest upon a legitimate claim of entitlement grounded in the statutes, regulations, or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in recent decisions involving the assertion of property interests.

Those decisions make it clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement [illegible].

A legitimate claim of entitlement exists only when the State has bound itself, either by statute, regula-

tion, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss* v. *Lopez*, *supra*, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient cause." See also *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, slip op. 10. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Board of Regents* v. *Roth*, for example, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protec-

tions of due process are not implicated.[13] As Mr.

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[13] At least one court of appeals has rejected an argument similar to the one we have made here, holding that it "attempts to resurrect the now-discredited right-privilege dichotomy as an analytical approach to due process * * *." *Cardaropoli* v. *Norton*, 523 F.2d 990, 995, n. 11 (C.A. 2). Petitioner makes a similar contention (Br. 32). We submit that this characterization misconceives the thrust of our argument.

Under the right-privilege distinction, benefits created by substantive constitutional guarantees were "rights," and those created by statute were "privileges" subject to unfettered governmental control. A State could defend a claim that it had denied due process of law by answering that, because the State was not constitutionally required to give the benefit in question to *anyone*, plaintiff could not complain that he had not received it, no matter how arbitrary the State's decision and no matter what sort of discrimination the State may have practiced. Thus even entitlements founded on statutory guarantees were not enforceable in practice.

The question whether there is a "liberty" or "property" interest—an inquiry established by the Constitution itself—is quite different. This Court held in *Roth* that "property" interests are founded only upon statutes, rules, or settled course of practice. The question in a case of this sort, therefore, is whether any statute, rule, or practice has created for the prisoner a legitimate claim of entitlement contingent upon specific facts. If it has done so, the Due Process Clause applies even though the entitlement may be a "privilege" that could be revoked at any time by altering the rules that created the entitlement. For example, one deprived of welfare is protected by the Due Process Clause. *Goldberg* v. *Kelly*, 397 U.S. 254. And if a State provides that any individual who is "unemployed" shall be entitled to receive unemployment compensation, the expectation of benefits would be a property interest because benefits would be contingent upon provable facts. An applicant for unemployment benefits therefore would be entitled to due process of law. Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 401-402 (application for Social Security benefits); *Geneva Towers Tenants Organization* v. *Federated Mortgage*

Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

C. Petitioner Has No Legitimate Claim Of Entitlement To Release On Parole

We turn, therefore, to an application of these principles to the facts of this case.

Kentucky law provides the Parole Board with discretion to grant or deny parole; the parole decision is to be made not on the basis of any objective facts, but on the basis of the predictions the Board may be able to make about the prisoner's ability to live peacefully in the larger society. Kentucky Rev. Stat. §§ 439.320, 439.330 and 439.340 (1973). See also Section 9 of the Kentucky Parole Board Regulations

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Investors, 504 F.2d 483, 495-496 (C.A. 9) (Hufstedler, J., dissenting); *Raper* v. *Lucey*, 488 F.2d 748 (C.A. 1) (application for a driver's license). (What process would be "due" in these cases would depend, of course, upon the balance between the interests of the individual and those of the government.)

Under our argument, the applicability of the Due Process Clause turns not upon the *source* of the rule arguably creating a claim of entitlement, or upon the label attached to the claim, but upon whether there *is* a legitimate claim of entitlement—that is, whether any rule of law provides that specific facts entitle an inmate to release prior to the expiration of his term of imprisonment. The right-privilege dichotomy depended upon the source of the rule in question; the inquiry into liberty or property looks to the nature of the entitlement created, and to whether there is a rule at all.

(Pet. Br. 5a-6a); *Harrison* v. *Robuck*, 508 S.W.2d 767 (Ky.). Cf. 18 U.S.C. 4203. The decision to grant or deny parole is a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). No particular fact or set of facts is determinative, nor could it be, for although facts are surely important to the parole release decision, the ultimate question involves an assessment of the prisoner's character.[14] There is no fact or set of facts that a prisoner can prove that will establish his entitlement to have the Board

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[14] Petitioner observes (Br. 27-28) that the federal Board of Parole's guidelines articulate some objective criteria that influence release decisions. These guidelines do not, however, diminish the Board's discretion. They indicate a convenient point of reference, a "normal" range of release times, but the Board is free at any time, and for any constitutionally permissible reason, to depart from these ranges. See 28 C.F.R. 2.18 (1975) ("[t]he granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability that he will live and remain at liberty without violating the laws (18 U.S.C. 4203(a))"); 28 C.F.R. 2.20(c) (1975) ("[t]hese time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered").

place trust in his character.[15] In short, no set of facts that petitioner could prove or attempt to prove would entitle him to parole.[16] Because the decision whether to grant parole is not determined by any particular controvertible facts, but instead is entrusted to the discretion of the Board, petitioner has no liberty or property interest in being released on parole.

We do not argue that no constitutionally protected interest is involved in any aspect of the parole process. Under Kentucky law, petitioner has a legitimate claim of entitlement to be considered for parole; the State guarantees to every prisoner a review and consideration of his case upon its merits. The State may not deprive a particular prisoner of that consideration without due process. But petitioner does not contend that he has been denied consideration for parole.

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[15] Petitioner's complaint demanded (App. 9) that respondents be ordered to promulgate "standards, norms or rules" that would delimit or remove respondents' discretion in deciding whom to release on parole. If as a result of such rules a prisoner would be entitled to release upon proof of specific facts, the prisoner would acquire a legitimate claim of entitlement. The Constitution does not require the promulgation of such rules, however. See *Board of Regents* v. *Roth, supra.* Only the Due Process Clause itself could be the source of a constitutional compulsion to promulgate such rules; but, as we have argued, that Clause does not apply to the parole process until, by creating rules, the State has established a "property" interest. Consequently, there is no warrant for compelling a State to promulgate restrictive substantive rules that would, in turn, trigger constitutional procedural protections. See also *Haymes* v. *Regan,* 525 F.2d 540 (C.A. 2).

[16] "It is well-established that the Board of Parole * * * has absolute discretion in parole matters." *Clay* v. *Henderson,* 524 F.2d 921, 924 (C.A. 5).

Moreover, the fact that petitioner was entitled to consideration does not, standing alone, entitle him to any particular procedures upon consideration. Neither statute, regulation, rule, nor course of practice establishes any more elaborate procedures upon consideration than petitioner's case was accorded. Petitioner therefore has no entitlement apart from the Due Process Clause to more elaborate procedures. And since the grant of parole upon consideration is a discretionary decision not turning upon provable facts, the Due Process Clause itself does not apply.[17]

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[17] The majority of the courts of appeals to consider the question have agreed with the court below that the Due Process Clause does not apply to applications for parole, at least in the absence of a statute or regulation creating an entitlement to parole subject to defeasance only upon certain facts. See *Scarpa* v. *United States Board of Parole,* 477 F.2d 278 (C.A. 5) (*en banc*), vacated as moot, 414 U.S. 809; *Mosley* v. *Ashby,* 459 F.2d 477 (C.A. 3); *Madden* v. *New Jersey State Parole Board,* 438 F.2d 1189 (C.A. 3); *Dorado* v. *Kerr,* 454 F.2d 892 (C.A. 9), certiorari denied, 409 U.S. 934; *Barnes* v. *United States,* 445 F.2d 260 (C.A. 8); *Schawartzberg* v. *United States Board of Parole,* 399 F.2d 297 (C.A. 10).

Four courts of appeals have held that the expectation of parole release is a "conditional liberty" that cannot be denied without procedural protections. *Bradford* v. *Weinstein,* 519 F.2d 728 (C.A. 4), vacated as moot, December 10, 1975, No. 74-1287; *United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (C.A. 7); *Childs* v. *United States Board of Parole,* 511 F.2d 1270 (C.A.D.C.); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 500 F.2d 925 (C.A. 2), vacated as moot, 419 U.S. 1015. The First Circuit apparently has assumed that the expectation of parole is a liberty interest. See *Meachum* v. *Fano, supra.* Cf. *Grattan* v. *Sigler,* 525 F.2d 329 (C.A. 9) (Due Process Clause requires federal

We do not quarrel with petitioner's observation that prisoners subjectively may experience a "grievous loss" upon being denied parole. But the loss in question stems not from the deprivation of an entitlement, but rather from the disappointment of an expectation. The loss results not because the State's actions were unauthorized, but merely because those actions did not meet petitioner's unilateral expectations.[18] As the *Roth* decision teaches, such a loss does

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Board of Parole to provide a statement of reasons adequate under its own guidelines).

A closely related question is whether the setting of a tentative parole release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise*, 494 F.2d 1176 (C.A. 5) (no liberty interest until actual release date) and *McIntosh* v. *Woodward*, 514 F.2d 95 (C.A. 5) (same), with *Jackson* v. *Wise*, 390 F. Supp. 19 (C.D. Cal.) (setting of tentative release date creates a liberty interest).

[18] Petitioner argues that parole is now an accepted feature of our prisons, and that many prisoners are paroled (Br. 23-24, 32-33). Because eventual parole is the rule rather than the exception, the argument concludes, the prisoner's expectation of release is not "unilateral" but has real substance. The same argument was rejected by this Court in *Roth*; there, too, most teachers were rehired. The problem with the argument is that it does not explain how the fact that *most* teachers are rehired and that *most* prisoners eventually are paroled can be converted into a legitimate claim of entitlement for *this* teacher to be rehired or for *this* prisoner to be paroled. That conversion could be accomplished only through a set of rules of general applicability establishing substantive release criteria binding upon the decisionmaker—petitioner's complaint asserted, however (App. 3-4, 7), that the release criteria in Kentucky are "wholly subjective" and do not bind respondents to take particular actions in response to particular facts.

not amount to the deprivation of a constitutionally protected interest: the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.[19]

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[19] Indeed, in the last analysis this case is indistinguishable from *Roth*. Petitioner's argument, as bottom, appears to be: "Prisoners have a right to be considered for parole. Many prisoners are paroled. If my application for parole had been granted, I would have acquired a constitutionally protected interest in remaining at liberty, for under statute I could not be reimprisoned without due cause. Therefore I have a constitutionally protected interest in the possibility of receiving parole, and the parole board must comply with the requirements of due process before it denies my application." This argument appears identical to the one rejected in *Roth*. The teacher's argument there was: "Teachers have a right to be considered for employment in the next academic year. Many teachers are rehired. If my contract had been renewed, I would have had a constitutionally protected interest in my employment, because under the contract I could not be fired without due cause. Therefore I have a constitutionally protected interest in the possibility of renewal, and the university must comply with the requirements of due process before it decides not to renew my contract." The weakness in those arguments lies in the "therefore." The liberty or property interest arises only when the contract is renewed, only when the prisoner is granted parole. It does not arise before. The "therefore," which relates to the period before the protected interest arises, is merely a verbal bridge lacking any logical foundation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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